U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1620878

Date: JUNE 17, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a cargo services company, seeks to employ the Beneficiary as a senior analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The petition was initially approved. The Director of the Texas Service Center subsequently revoked the approval of the petition, concluding that the record did not establish that the Petitioner made a *bona fide* job offer to the Beneficiary or that the job was clearly open to any U.S. worker. The Director also determined that the Petitioner fraudulently or willfully made a misrepresentation on the labor certification, and he invalidated the labor certification.

On appeal, the Petitioner submits additional evidence and asserts that the job offer is *bona fide*; and that the Petitioner did not fraudulently or willfully make a misrepresentation on the labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. The Employment-Based Immigration Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is February 9, 2015. *See* 8 C.F.R. § 204.5(d).

offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. *See* section 204 of the Act, 8 U.S.C. § 1154. Third, upon approval of the petition, a foreign national may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. Revocation of a Petition's Approval

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record and substantial evidence, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a).

If the revocation will be based on any ground other than those specified in 8 C.F.R. § 205.1 (provisions governing conditions that trigger automatic revocation of approval), then USCIS must issue a notice of intent to revoke (NOIR) and provide the opportunity to submit evidence in opposition thereto, before proceeding with a written notice of revocation (NOR). *See* 8 C.F.R. § 205.2(b) and (c).

A NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

Under 8 C.F.R. § 205.2, USCIS may revoke the approval of an employment-based immigrant petition on notice where the petition is not supported by a valid labor certification.[2] *See* 8 C.F.R. § 204.5(l)(3)(i) (stating that every petition under section 203(b)(3) of the Act "must be accompanied by an individual labor certification from the [DOL], by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the [DOL's] Labor Market Information Pilot Program.").

Here, the Director relied on the regulation at 8 C.F.R. § 205.2 by providing proper notice to the Petitioner and giving them an opportunity to offer evidence in support of the petition and in opposition to the grounds of revocation listed in the NOIR.

[2] The DOL regulation at 20 C.F.R. § 656.30(d) authorizes USCIS to invalidate a certification after finding fraud or willful misrepresentation "involving the labor certification application."

II. BONA FIDE JOB OPPORTUNITY

The Director revoked the petition's approval because the record does not establish the *bona fides* of the job opportunity. Any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The *bona fides* of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act[3] allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). For those petitions requiring a labor certification, USCIS' investigation into the facts must include consultation with DOL. *Id*. Thus, the labor certification is not conclusive evidence of eligibility; instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the

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[3] Section 204(b) of the Act, 8 U.S.C. § 1154(b), states:

> After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.,* 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) *(en banc)*; *see* 20 C.F.R. § 656.17(l).[4] A relationship between a petitioner and a beneficiary triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374,* 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000). If a petitioner knowingly misrepresented the *bona fides* of a job opportunity, USCIS may invalidate a labor certification after its issuance. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS invalidation upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification").

In order to assess in part whether a job offer is *bona fide*, Part C.9 of the labor certification asks, "Is the employer a closely held corporation... in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner checked 'No' in response to this question, indicating that there is no relationship between the Beneficiary and the owners, stockholders, partners, corporate officers, or incorporators of the Petitioner.

However, the record establishes the following familial relationships between the Beneficiary and the Petitioner:

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[4] The regulation at 20 C.F.R. § 656.17(l) states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
>
> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
>
> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
>
> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
>
> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

- [redacted] a 13% owner and managing member of the Petitioner, is the brother of the Beneficiary's husband;
- [redacted] the 50% owner and President of the Petitioner, is the uncle of the Beneficiary's husband; and
- [redacted] the general manager of the Petitioner, is the Beneficiary's husband.

By checking the box 'No' for Part C.9, the Petitioner did not disclose these familial relationships to DOL on the labor certification.

On appeal, the Petitioner asserts that it did not check 'Yes' to Part C.9 of the labor certification because there is not a blood relationship between the Petitioner and the Beneficiary. It states that it considered the relationships of the owners "too far removed to be required to be disclosed." It states that in making this decision, it relied on the guidance provided by DOL in its answer to a frequently asked question (FAQ) on its website.

In the FAQ, DOL specified that "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. ... It also includes relationships established through marriage, such as in-laws and step-families." OFLC Frequently Asked Questions & Answers, Familial Relationships, at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited June 15, 2021). [redacted] 13% owner and managing member of the Petitioner, is the Beneficiary's brother-in-law. Thus, contrary to the Petitioner's assertion on appeal, the FAQ clearly states that a familial relationship includes in-law relationships.

Further, several decisions from the Board of Alien Labor Certification Appeals (BALCA) have indicated that in-law relationships between foreign nationals and their prospective employers constitute familial relationships that trigger concerns about the *bona fides* of the job opportunities. *See, e.g., Matter of Sunmart,* 2000 WL 707942, at *3; *Matter of Topco USA, Inc.,* 93-INA-00516, 1996 WL 86214 *4 (BALCA Feb. 23, 1996) (upholding a certification denial based solely on a "family relationship... between a foreign national and his sister-in-law, an officer and director of the employer"); *Matter of Altobelli's Fine Italian Cuisine,* 90-INA-130, 1991 WL 239636 *3-4 (BALCA Oct. 16, 1991) (finding that a foreign national's relationship to his sister-in-law, the employer's corporate secretary, constituted a "family relationship"'). The Petitioner should have responded "Yes" to the question at Part C.9, as it was clearly applicable to the in-law relationship between the Petitioner's owners and corporate officers and Beneficiary.

On appeal, the Petitioner cites a BALCA decision and states that a familial relationship on its face does not invalidate a *bona fide* job offer. *Paris Bakery Corp.*, 88-INA-337 (BALCA Jan. 4, 1990). We agree. In determining the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive

presence that the employer would be unlikely to continue in operation without the foreign national. *Modular Container*, 1991 WL 223955, at *8-10. As previously noted, the DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(l). In order for DOL to examine the issue more closely prior to certification, the Petitioner must properly complete Part C.9.

Upon review of the totality of the circumstances in this case and consideration of the *Modular Container* factors, the record does not establish the existence of a *bona fide* job opportunity. The Beneficiary is related to the owners, President, and managers of the Petitioner. Additionally, she is one of a small group of employees. The Petitioner indicated on the petition and labor certification that it has only three employees, including the Beneficiary who, according to the labor certification, has been working for the Petitioner in the offered job since 2014. Further, the Beneficiary's husband is the general manager of the Petitioner. According to USCIS records, he is responsible for overseeing the day-to-day operations of the Petitioner's business; he is responsible for hiring decisions; and he is the Beneficiary's direct supervisor. His relationship to the Beneficiary diminishes the credibility of the Petitioner's certification that the job offer in this case was *bona fide* and clearly open to any U.S. worker. Therefore, we will affirm the Director's finding that the job offer was not *bona fide* and that the job was not clearly open to any U.S. worker.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT AND INVALIDATION OF LABOR CERTIFICATION

The Director determined that the Petitioner fraudulently or willfully made a misrepresentation on the labor certification, and he invalidated the labor certification. USCIS will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the claims stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. at 591.

Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states that "in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." A finding of willful misrepresentation of material fact against a petitioner or beneficiary requires the following elements:

- The petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner or beneficiary made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual.

A misrepresentation is willful if it is "deliberately made with knowledge of [its] falsity." *Matter of S- and B-C-*, 9 I&N Dec. 436, 445 (BIA 1960; A.G. 1961); *see also Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975) (noting that, unlike fraud, a finding of willfulness does not require an "intent to deceive"). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Here, the Petitioner indicated on the labor certification that the Beneficiary did not have a familial relationship to the Petitioner. However, the Beneficiary is related to the owners and corporate officers of the Petitioner. Therefore, the Petitioner's answer at Part C.9 on the ETA Form 9089 was not correct and constitutes a false representation. Further, its certification that the job opportunity "has been and is clearly open to any qualified United States worker" was not correct and constitutes a false representation. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). For the reasons discussed above, because the job opportunity is not *bona fide*, the Petitioner's false attestation on the labor certification constitutes a false representation on the face of a written petition.

Second, we find that the Petitioner willfully made the misrepresentation. [redacted] signed the labor certification in his capacity as President of the Petitioner. He knew of his role and the roles of [redacted] and [redacted] in the three person organization, and of their relationships with the Beneficiary. *See Matter of Silver Dragon Chinese Rest.,* 19 I&N Dec. 401, 404 (Comm'r 1986) (finding that "the officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise"). The Petitioner asserts on appeal that the lack of direct guidance on the issue of familial relationships leaves it open to interpretation, and that a difference in interpretation is not a willful misrepresentation. We disagree that the guidance on in-law relationships is open to interpretation.[5] DOL's direct guidance, which was included as an attachment to the Petitioner's appeal, states that a familial relationship includes "relationships established through marriage, such as in-laws and step-families." OFLC Frequently Asked Questions

[5] The Petitioner indicates that it received the guidance regarding familial relationships from its attorney. However, the record does not contain a claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

& Answers, Familial Relationships, at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited June 15, 2021). The FAQ further states that "failure to disclose familial relationships... when responding to Question C.9 is a material misrepresentation" and may be grounds for revocation or invalidation. *Id.*

Third, the evidence is material to the Beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation cut off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Ng*, 17 I&N Dec. at 537. Here, a material issue in this case is whether a *bona fide* job offer exists. The Petitioner's misrepresentations cut off a potential line of inquiry regarding the *bona fides* of the job opportunity. If DOL had known the true facts, that the Beneficiary was related to the owners and corporate officers of the Petitioner, it may have audited the labor certification or denied it. However, the DOL's inquiry was cut off by a false answer to a critical question on the labor certification.

The Petitioner willfully misrepresented its answer to Part C.9 of the labor certification and its attestation on the labor certification that "[t]he job opportunity has been and is clearly open to any U.S. worker." Thus, we affirm the Director's finding that the job offer was not *bona fide* and that the Petitioner willfully misrepresented its attestation on the labor certification.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [USCIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." Based on the Petitioner's willful misrepresentation of a material fact, the ETA Form 9089 will remain invalidated.

Alternatively, as noted above, USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act; 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 103.2(b)(1) (which states that "[a]ny evidence submitted in connection with a benefit request is incorporated into and considered part of the request."). USCIS must investigate the facts in each case and determine "whether the facts stated in the petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). It is clear under the statute that USCIS may reject a fact stated in the petition if it does not believe that fact to be true. *Id.*; *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As set forth above, after examination and investigation of the facts in this matter, the facts stated in this petition are not true with respect to the Beneficiary's influence and control over the labor certification and *bona fides* of the job opportunity being open to U.S. workers. Therefore, following USCIS' investigation into the facts, this petition cannot be approved. This forms a separate and distinct basis for dismissal.

IV. ABILITY TO PAY THE PROFFERED WAGE

Although not discussed by the Director, the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date of February 9, 2015. The proffered wage is $82,430 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record contains the Petitioner's tax return for calendar year 2014. It does not contain regulatory-prescribed evidence of the Petitioner's continuing ability to pay the proffered wage from the petition's priority date in 2015. Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

V. CONCLUSION

We conclude that the Director properly revoked the approval of the petition because the record does not establish the existence of a *bona fide* job opportunity or that the job was clearly open to any U.S. worker. The facts in the petition are not true, as required by section 204(b) of the Act, and the Petitioner does not realistically intend to employ the Beneficiary in accordance with the terms and conditions set forth in the labor certification, as required by section 204(a)(1)(F) of the Act. We further conclude that the Director properly invalidated the labor certification based on the Petitioner's willful misrepresentation of a material fact.

ORDER: The appeal is dismissed.